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No. 78-1704

In the Supreme Court of the United States

OCTOBER TERM, 1978

CALIFORNIA INSPECTION RATING BUREAU,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner is a nonprofit association organized under California law to perform rating and statistical work with respect to firms that issue workmen's compensation insurance policies in that state.[1] In response to a petition filed by the Pro-

[1] The California Insurance Code, Cal. Ins. Code § 11750.1(b) (West 1972), defines a "rating organization" such as petitioner as "any organization which has as its primary object or pur-

fessional and Clerical Employees Division of Teamsters Local No. 856 ("the Union"), the Board directed an election among petitioner's employees. In its Decision and Direction of Election (Pet. App. B-1 to B-18), the Board rejected (Pet. App. B-7 to B-9) petitioner's contention that it is a "political subdivision" of the State of California under Section 2(2) of the National Labor Relations Act, 29 U.S.C. 152(2), which defines "employer" to exclude "any State or political subdivision thereof." The Board also rejected (Pet. App. B-9 to B-10) petitioner's alternate contention that the Board in its discretion should decline to exercise jurisdiction because of petitioner's "intimate connection" with the State and its functions (Pet. App. B-2). The Union won the election and was certified; petitioner refused to bargain and the Union filed an unfair labor practice charge. The Board granted the General Counsel's motion for summary judgment and ordered petitioner to bargain

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pose the collecting of rating information, the making of rates, rating plans and rating systems for workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith and presenting them to the commissioner for issuance or approval" (see Pet. App. F-7). As the Board found (Pet. App. B-2 to B-3, B-7), the Code does not preclude the establishment and operation of more than one rating organization, although only one has been established. However, only one rating organization may be designated by the State Insurance Commissioner as his agent to gather and compile statistics under § 11751.5 of the Code and petitioner has been so designated. (Pet. App. F-10 to F-13, B-3; Tr. 110-112, 140-143, 83.) ("Tr." references are to the transcript of the pre-election representation hearing in June, July, and August, 1974.)

with the Union (Pet. App. C-1 to C-14). Thereafter, the Board issued a supplemental decision (Pet. App. D-1 to D-4), explaining further its reasons for exercising jurisdiction over petitioner.

2. The court of appeals enforced the Board's order (Pet. App. A-2 to A-3). It held that the Board, in rejecting petitioner's Section 2(2) defense, had "correctly applied the principles stated by the Court" in *NLRB* v. *Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-605 (1971) (Pet. App. A-2). The court also found that the Board's discretionary determination to exercise its statutory jurisdiction in this case "has a reasonable basis in the evidence and is not inconsistent with the law," quoting *NLRB* v. *E. C. Atkins & Co.*, 331 U.S. 398, 403 (1947) (Pet. App. A-3).

3. Petitioner agrees (Pet. 12) that *NLRB* v. *Natural Gas Utility District, supra*, governs this case. Its contention that the Board and the court of appeals, in applying that case to these facts, reached an incorrect result turns on the facts of this case and presents no issue warranting this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951).

In any event, the Board's determination that petitioner is not a political subdivision of the State is in full accord with *NLRB* v. *Natural Gas Utility District, supra.*[2] The Court there determined that the

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[2] There is no merit to petitioner's contention (Pet. 12) that the Board "assumed, in rejecting [petitioner's] claim of political subdivision status, that Petitioner was a nonexempt

employer utility district was a political subdivision of the State under the Board's own standards because it was "administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 605 (emphasis omitted). As the Court pointed out, the district was administered "by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens." *Ibid.* In addition, the district was created by order of a county judge, was declared by statute to be a "municipality" or public corporation, and had the power of eminent domain and the power to subpoena witnesses. 402 U.S. at 606-608.

Here, by contrast, the Board found (Pet. App. B-7) that petitioner was neither "directly created by the State" nor "administered by individuals who are responsible to public officials or to the general electorate." Although the California Insurance Code provides that a rating organization like petitioner "may be organized" pursuant to the Code, it does not provide that any entity so organized is to be a state

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employer and that, accordingly, the decision to decline jurisdiction was discretionary * * *." As the court of appeals found (Pet. App. A-2), petitioner's defense that it was exempt as a political subdivision of the State was "carefully considered by the Board" and properly rejected under *NLRB* v. *Natural Gas Utility District, supra.* Indeed, petitioner apparently abandoned this defense in the court of appeals, for its brief did not even cite *NLRB* v. *Natural Gas Utility District.* Petitioner instead relied on the alternate contention that the Board should have declined jurisdiction as a discretionary matter.

agency (Pet. App. F-8; Cal. Ins. Code § 11750.3 (West 1972)). Petitioner's membership consists of the approximately 280 insurance carriers licensed to write workmen's compensation insurance in the State; they alone fund its operations and elect five of the six members of its governing committee (Pet. 7-8; Pet. App. B-3, B-4, B-9, F-13; Tr. 28-29, 61). The sixth member is a representative of the State Compensation Insurance Fund (Pet. App. B-3, F-12; Tr. 28-29), a workmen's compensation insurance carrier that is run by the State, in competition with private companies (Pet. App. B-4 to B-5; Tr. 114, 29). The State Fund member does not represent the State Insurance Commissioner; he represents an insurance carrier, as do the five representatives of private insurance companies, who may outvote him (Tr. 115-116, 29, 102). None of the private insurance company representatives on the governing committee is paid by the State; none is answerable to the State, the State Insurance Commissioner, or the general public (Tr. 113, 103-104).

4. Petitioner's contention (Pet. 13) that the decision of the Board "contravene[s] the intent of the California Legislature in denying public employees the right to strike" assumes that petitioner's employees are public employees. But the Board found, with substantial evidentiary support, that petitioner's employees are not state employees; they are not covered by civil service, and their compensation, hiring, training, labor relations and other employment conditions are within the exclusive control of petitioner, a non-

governmental employer (Pet. App. B-6, B-9; Tr. 64, 101, 112, 245-252). Similarly, there is no merit to petitioner's contention (Pet. 14-15) that a constitutional issue is presented by the Board's assertion of jurisdiction in this case, given the Board's factually supported finding that petitioner is not a political subdivision of the State.

Finally the cases cited by petitioner (Pet. 15) do not support its contention that it is a political subdivision of the State and thus exempted under Section 2(2) of the Act. Rather, they involve the Board's "intimate connection" test, under which the Board, as a matter of discretion, declined to assert jurisdiction over nongovernmental employers who performed services that were "intimately connected" with the exempt functions of a governmental entity.[3] As the court of appeals found in approving the Board's application of its intimate connection test here (Pet. App. A-3), the Board "has considerable discretion in deciding whether or not to exercise jurisdiction that it has" and its decision to exercise its jurisdiction over petitioner had a reasonable evidentiary basis and was not inconsistent with the National Labor Relations Act. Accordingly, whether the Board properly applied that test in other cases does not affect its decision to exercise jurisdiction here.

[3] Shortly before the court of appeals issued its decision in this case, the Board abandoned its "intimate connection" test and announced that it would no longer decline jurisdiction over nongovernmental employers on this basis. *National Transportation Service*, 240 N.L.R.B. No. 64, 100 L.R.R.M. 1263 (Feb. 5, 1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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